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7 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 AVERY SIMMONS, an individual,

10 Plaintiff,

11 v.

12 SAFEWAY, INC., d/b/a HAGGEN FOOD
AND PHARMACY, a Delaware
13 corporation,

14 Defendant.

CASE NO. 18-5522 RJB

ORDER ON MOTION TO
EXCLUDE

15 THIS MATTER comes before the Court on Defendant Safeway, Inc., d/b/a Haggen Food
16 and Pharmacy's ("Haggen" or "Defendant") Motion to Exclude Report and Testimony of Amy
17 Stephson under *Daubert* [*v. Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993)] and Rule 702. Dkt.
18 40. The Court has considered the pleadings filed regarding the motion and the remaining file.

19 On May 14, 2018, Plaintiff Avery Simmons filed this employment discrimination case in
20 Thurston County, Washington, Superior Court, in connection with her employment at Haggen's
21 Olympia, Washington store. Dkt. 1-2. Haggen moves for an order excluding Plaintiff's
22 purported expert, Amy Stephson's, report and testimony. Dkt. 40. For the reasons provided
23 below, Haggen's motion to exclude (Dkt. 40) should be granted.

1 **FEDERAL RULE OF EVIDENCE 702 and DAUBERT STANDARDS**

2 Federal Rule of Evidence 702 states:

3 If scientific, technical, or other specialized knowledge will assist the trier of fact to
4 understand the evidence or to determine a fact in issue, a witness qualified as an expert
5 by knowledge, skill, experience, training, or education, may testify thereto in the form of
6 an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the
7 testimony is the product of reliable principles and methods, and (3) the witness has
8 applied the principles and methods reliably to the facts of the case.

9 In *Daubert*, the U.S. Supreme Court “held that Federal Rule of Evidence 702 imposes a
10 special obligation upon a trial judge to ‘ensure that any and all scientific testimony . . . is not
11 only relevant, but reliable.’” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147
12 (1999)(quoting *Daubert*, at 589). In *Kumho Tire*, the Supreme Court extended the *Daubert* and
13 held that Rule 702 applies to all expert testimony, not just “scientific expert testimony.” *Id.* The
14 rule has been interpreted within the Ninth Circuit to require that expert testimony be “both
15 relevant and reliable.” *Estate of Barabin v. Asten Johnson, Inc.*, 740 F.3d 457, 463–64 (9th Cir.
16 2014).

17 **MOTION TO EXCLUDE REPORT AND TESTIMONY and RESPONSE**

18 Haggen moves to exclude Ms. Stephson’s report and testimony, arguing that: (1) she
19 failed to comply with a subpoena duces tecum; (2) she “presents opinions that lack foundation –
20 maintaining that she has never been admitted as an expert, held a human resources management
21 position, and cannot identify any published human resources standards upon which she relies;”
22 (3) she presents legal opinions; (4) her opinions and “purported [human resources] standards
23 have never been peer reviewed; and (5) her opinions “invade the province of the jury.” Dkts. 40
24 and 46.

1 The Plaintiff opposes the motion, and argues that: (1) Haggen failed to meet and confer
2 on this issue, failed to meet the requirements of Fed. R. Civ. P. 45 regarding the subpoena,
3 makes no showing that Ms. Stephson's failure to provide drafts of her report should result in
4 exclusion of her report or testimony, (2) she is qualified as an expert on workplace investigations
5 because she has been a licensed attorney for over 40 years, has focused on employment law for
6 the last 23, and has conducted over 290 workplace investigations, focused primarily on claims of
7 harassment, discrimination and retaliation; (3) Ms. Stephson's opinions are relevant to the claims
8 and defenses asserted and does not offer legal conclusions or credibility determinations; (4) her
9 opinions are reliable based on her review of the records, personal experience, training and
10 education and "to the extent the Court feels it does not have enough information about
11 Stephson's experience, personal knowledge, and the resources she used, . . . it should allow
12 Stephson or Plaintiff to elaborate for the Court at a hearing specifically for that purpose." Dkt.
13 43.

14 **DISCUSSION AND RULING**

15 The Court chooses here to determine the admissibility, under Rule 702 and *Daubert* and
16 *Kumho*, of the information in Ms. Stephson's report (Dkt. 41) and to bypass the other issues
17 raised by Defendant (meet and confer, compliance with subpoena, provision of drafts and
18 qualifications of Ms. Stephson).

19 Perhaps sadly, none of the information in Ms. Stephson's report (Dkt. 41) is admissible in
20 evidence for the following reasons:

21 1. Although she refers to "standard human resources practices" (Dkt. 41 at 14) and "a
22 professional fact-finding process," she does not identify a source or foundation for such practices
23 and processes, leaving her views about such matters as *ipse dixit*, and without any foundation to
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1 support admissibility. Her report purports to test the Defendant's investigation against these
2 unknown "standards."

3 2. Much of Ms. Stephson's report is a recitation of what she believes the facts to be. The
4 jury can and should determine the facts without Ms. Stephson's opinions of the evidence.

5 3. Much of Ms. Stephson's report is her opinions of the meaning of, and interpretation
6 of, the evidence. (For example: "Parker has become adversarial" (Dkt. 41 at 13). "By this
7 point, Parker is scolding Simmons for not returning to work" (*Id.* at 13). "Parker has firmly
8 crossed the line from interviewee to adversary" (*Id.*). "Parker's view of this as something
9 suspicious seems to indicate bias against Simmons as well as a belief . . . that Simmons was not
10 credible" (*Id.* at 12). "None of the people to whom Simmons brought her concerns took them, or
11 her, seriously" (*Id.* at 16). There are many other examples in Ms. Stephson's report.) Such
12 opinions are not admissible and directly invade the province of the jury.

13 4. Much of Ms. Stephson's report is a recitation of how Haggen's investigation did not
14 live up to its own "Crew Member Handbook: Policies and Procedures (Revised 2017)." A jury
15 does not need an expert to help them decided such issues. Her testimony on this subject would
16 not assist a jury "to understand the evidence or to determine a fact in issue" (ER 702).

17 For all of the foregoing reasons, the Defendant's Motion to Exclude Report and
18 Testimony of Amy Stephson under *Daubert* and Rule 702 (Dkt. 40) should be GRANTED.

19 **ORDER**

20 It is **ORDERED** that:Defendant's Motion to Exclude Report and Testimony of Amy
21 Stephson under *Daubert* and Rule 702 (Dkt. 40) is GRANTED.

1 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
2 to any party appearing *pro se* at said party's last known address.

3 Dated this 8th day of July, 2019.

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5 ROBERT J. BRYAN
6 United States District Judge
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